

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Petition for Declaratory Ruling of the National	)	MB 04-160
Association of Broadcasters Regarding Programming	)	
Carried By Satellite Digital Audio Radio Service	)	
Providers	)	

**OPPOSITION OF SATELLITE BROADCASTING AND COMMUNICATIONS ASSOCIATION**

Richard DalBello  
President  
Satellite Broadcasting and Communications Association  
225 Reinekers Lane – Suite 600  
Alexandria, VA 22314  
(703) 549-6990

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## **Summary**

The Satellite Broadcasting and Communications Association urges the Commission to summarily dismiss the Petition for Declaratory Ruling filed by the National Association of Broadcasters.

NAB's Petition is the most recent in its long history of attempts to preclude new technologies that could possibly provide competition to its members. SBCA urges the Commission instead to maintain policies that value the interests of American consumers and promote new and innovative uses of spectrum.

While NAB claims that XM and Sirius have broken their "promises" to provide national-only programming by introducing a "locally oriented" traffic and weather service, no promises have been broken. Satellite radio is still "national," from both a technological and a content perspective. From a technological perspective, all satellite radio programming is transmitted nationwide to all receivers simultaneously. From a content perspective, while XM and Sirius offer some programming that may be of more interest to people in certain geographic areas than others, this does not convert the content of the programming from "national" to "local" in nature.

NAB argues that the traffic and weather service offered by XM and Sirius will harm terrestrial broadcasters, but it offers no evidence to support this claim. Even if there was an economic impact, it would be minor and primarily in the twenty major metropolitan areas in which XM and Sirius provide the service, rather than the "small markets" with which NAB expresses concern.

The traffic and weather services provided by XM and Sirius provide crucial public interest benefits, such as providing alerts as to impending severe weather, informing drivers of traffic congestion allowing them to plan alternate routes thereby saving time and fuel, and facilitating traffic management particularly for long-distance drivers such as truckers. If granted,

NAB's Petition would deprive the public of these crucial benefits. The over 24,000 satellite radio listeners that have filed comments to date in opposition to NAB's Petition demonstrate the degree to which consumers value this service.

Grant of NAB's requested prohibition would violate the First Amendment rights of XM and Sirius. A ban on "locally oriented" programming would be unconstitutionally vague and could not be sustained unless it was a "precisely-drawn means of serving a compelling state interest." The Commission cannot satisfy this standard in this case because, among other reasons, there is simply no evidence in the record that the traffic and weather service is causing harm to terrestrial broadcasters.

The Commission should also dismiss NAB's latest request that the Commission regulate satellite radio receiver technology. NAB has already specifically agreed that satellite radio receivers should be permitted to filter or block content. Adoption of NAB's proposal would preclude XM and Sirius from offering innovative and beneficial services, without any offsetting rational basis.

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**OPPOSITION OF SATELLITE BROADCASTING AND COMMUNICATIONS ASSOCIATION**

The Satellite Broadcasting and Communications Association (“SBCA”) hereby files this Opposition to the Petition for Declaratory Ruling filed by the National Association of Broadcasters (“NAB”) asking the Commission to prohibit XM Radio Inc. (“XM”) and Sirius Satellite Radio Inc. (“Sirius”) (collectively, the “Satellite Radio Providers”) from (i) offering “locally oriented” services on nationally distributed channels and (ii) using any technology that would permit delivery of content that would be aired on a receiver in one location that differs from content aired on a receiver in a different location.<sup>1</sup> SBCA urges the Commission to swiftly dismiss NAB’s Petition, which values the economic fears of some of its members over the interests of American consumers and the key public policy goals of promoting new and innovative uses of spectrum.

**Background**

*SBCA.* SBCA is the national trade organization representing all segments of the satellite industry. SBCA is comprised of satellite radio, Direct Broadcast Satellite (“DBS”), C-band, broadband, and other satellite service providers, content providers, equipment manufacturers,

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<sup>1</sup> National Association of Broadcasters, Petition for Declaratory Ruling (April 14, 2004) (“*NAB Petition*”).

distributors, retailers, encryption vendors, and national and regional distribution companies that make up the satellite services industry.

*Satellite Radio Providers.* In 1995, the Commission allocated spectrum in the S-band to the Satellite Digital Audio Radio Service (“SDARS” or “satellite radio”). XM Radio and Sirius were the winning bidders in the satellite radio auction held in April 1997, together committing nearly \$170 million to the U.S. Treasury.<sup>2</sup> XM Radio was awarded the license to provide satellite radio service in the 2332.5-2345 MHz band, and Sirius was awarded the license for the 2320-2332.5 MHz band.

As the Commission has repeatedly recognized, this new consumer-based mass media service promises enormous public interest benefits for the American public.<sup>3</sup> In the 1997 *SDARS Order*, the Commission recognized that satellite radio would provide multiple channels of nationwide audio programming, thereby increasing the variety of audio programming available to the listening public and serving listeners in areas of the country that have been underserved. *SDARS Order* ¶ 1. The Commission also authorized the Satellite Radio Providers to offer “ancillary” services and provided the following examples of such services: high speed broadcast data, location-based geographic information, electronic graphic/visual information, voice mail, and alpha-numeric messages. *Id.* ¶¶ 94-96. In response to claims by NAB and others that satellite radio would adversely impact terrestrial broadcasters, the Commission concluded that “the record does not demonstrate that licensing satellite DARS would have such a strong adverse impact that it threatens the provision of local radio service.” *Id.* ¶ 31.

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<sup>2</sup>*American Mobile Radio Corporation*, 13 FCC Rcd 8829 (Int’l Bur., 1997); *Satellite CD Radio*, 13 FCC Rcd 7971 (Int’l Bur., 1997).

<sup>3</sup>*See, e.g., Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band, Report and Order, Memorandum Opinion and Order*, 12 FCC Rcd 5754, ¶ 1 (1997) (“*SDARS Order*”).

The Satellite Radio Providers combined have spent over \$4 billion to construct, launch, and operate satellite constellations and in-band terrestrial repeaters. Together they already serve more than 2 million subscribers, with high customer growth rates. While the Commission originally envisioned that satellite radio would offer at most twenty audio channels,<sup>4</sup> compression technology has enabled XM and Sirius to each provide over 100 digital audio channels, substantially augmenting the diversity and choice available to American consumers. As a result, the Satellite Radio Providers have dramatically reduced the disparity in access to radio to 45 million underserved consumers in the United States, particularly those in rural areas.

*Traffic and weather service.* One of the innovative services currently offered by both XM and Sirius is a traffic and weather service that provides in-depth, up-to-the-moment updates on traffic and weather conditions for approximately twenty major metropolitan areas. The traffic and weather information is continually updated and transmitted nationwide, 24 hours per day, 7 days per week on a channel dedicated to a particular area. For example, a satellite radio listener located anywhere in the country can hear traffic reports and weather forecasts for Los Angeles simply by tuning to the channel dedicated to Los Angeles traffic and weather.<sup>5</sup> The service is

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<sup>4</sup> *SDARS Order* ¶ 15.

<sup>5</sup> As with all satellite radio programming, the traffic and weather information is simultaneously transmitted by both the satellites and terrestrial repeaters directly to subscribers' receivers. The service fully complies with the conditions imposed on the Special Temporary Authorizations held by XM and Sirius to operate terrestrial repeaters. *See XM Radio Inc., Order and Authorization*, 24 CR 845, 2001 FCC LEXIS 4930, DA 01-2172 (Sept. 17, 2001), at ¶ 18(c) ("SDARS repeaters are restricted to the simultaneous retransmission of the complete programming, and only that programming, transmitted by the satellite directly to SDARS subscriber's receivers."); *Sirius Satellite Radio Inc., Order and Authorization*, 24 CR 840, 2001 FCC LEXIS 4931, DA 01-2171 (Sept. 17, 2001), at ¶ 18(c) ("SDARS repeaters are restricted to the simultaneous retransmission of the complete programming, and only that programming, transmitted by the satellite directly to SDARS subscriber's receivers.").

offered as part of the basic monthly service fee. Available since early this year, satellite radio listeners are now “within minutes of their market-specific traffic and weather reports.”<sup>6</sup>

This traffic and weather service provides many vital public interest benefits. For example, the service increases driver safety by alerting drivers to impending threatening weather, allowing them to plan alternate routes or to delay trips. Similarly, satellite radio listeners at home or work benefit from up-to-date weather forecasts, particularly in the event of a fast-approaching storm. Moreover, by alerting listeners to impending traffic congestion, the service allows drivers to plan alternate routes to avoid congestion, thereby saving time and fuel. The service also facilitates traffic management for long-distance drivers. Because the traffic and weather information is broadcast nationally, travelers are able to plan alternate routes in advance if traffic is congested or weather is poor in a future destination.<sup>7</sup> For example, a southbound traveler on I-95 can listen to traffic and weather information for the Boston, New York City, Philadelphia, Baltimore, and Washington, DC areas and can plan accordingly when traffic is congested or weather is poor on the road ahead.<sup>8</sup> This saves time and fuel for long-distance drivers, including for the trucking industry which is vital to the nation’s economy.<sup>9</sup>

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<sup>6</sup> *Press Release*, “Sirius Satellite Radio Expands Traffic and Weather Information to 20 Markets Nationwide” (March 26, 2004) (available at: <http://www.sirius.com/servlet/ContentServer?pagename=Sirius/CachedPage&c=PresReleAsset&cid=1079995335425>).

<sup>7</sup> *See, e.g.*, Comment of Jim Edwards, MB Docket No. 04-160 (May 13, 2004) (“I live in Indiana and make trips up to Chicago several times a month. Right now it is great to click to the Chicago traffic before I get close because about 90 minutes away I have a choice of three directions to enter the city from, if I wait until I can pick up the station, I have missed the three way split.”).

<sup>8</sup> *See, e.g.*, Comment of Mr. and Mrs. Richard J. Casey, MB Docket No. 04-160 (May 4, 2004) (noting that truckers “are able to monitor the traffic in major towns while they are still hundreds of miles away – and unable to monitor local stations where the problem might be. They then can plan alternate routes that would save them and all of commerce a lot of wasted time and unnecessary expense.”).

<sup>9</sup> *See, e.g.*, Comment of Linda Hughes, MB Docket No. 04-160 (June 3, 2004) (“I am told many truckers are subscribers and I cannot imagine the savings of time and gas costs to them to know



Many terrestrial broadcast stations provide listeners with traffic and weather updates, but satellite radio offers certain unique advantages that terrestrial radio cannot match. First, the traffic and weather information offered via satellite radio is instantly and always available by simply tuning to a traffic and weather channel. Unlike with terrestrial radio, listeners do not have to wait for certain times of each hour to hear the information.<sup>10</sup> Moreover, the traffic and weather information offered via satellite radio is updated more frequently than on terrestrial radio.<sup>11</sup> Second, satellite radio service is nationwide and ubiquitous. XM and Sirius each provide service to 99% of the United States land mass with satellites and use terrestrial repeaters to cover the rest. There is no need to search for traffic and weather information when traveling into a new area.<sup>12</sup> For example, a satellite radio listener traveling north between Baltimore and Philadelphia does not have to search for a local Philadelphia station that offers traffic and weather as the listener leaves the coverage area of the local Baltimore stations. Rather, the listener need only tune to the channel dedicated to Philadelphia traffic and weather. Third, the

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what routes are to be avoided. With gasoline costs so high today, these truckers need all the help we can muster.”).

<sup>10</sup> See, e.g., Comment of Alan Bigos, MB Docket No. 04-160 (May 6, 2004) (“How many terrestrial radio stations are providing 24-hour traffic information? Local radio stations only give traffic reports during rush hours. Which local radio station can I tune to at 3 am for a traffic report?”).

<sup>11</sup> See, e.g., Comment of William West, MB Docket No. 04-160 (June 3, 2004) (“Currently, local traffic reports provided by most local radio stations are offered every 8 minutes, are not complete and usually ‘tardy’ in their reporting. Basically, unless you get lucky and turn on the radio at the right time, you have to wait for traffic reports and then hope they report on the area in which you are traveling. XM traffic reports, however, are constant, complete in coverage and accurate.”).

<sup>12</sup> See, e.g., Comment of Dr. Kenneth R. Susman, MB Docket No. 04-160 (May 6, 2004) (“I often travel to San Francisco and Oakland to see friends and family. Not being from the Bay Area, I am not immediately familiar with terrestrial radio stations that carry current traffic information. Unless the traffic reports were currently playing over the air, scanning the radio dial wouldn’t be of any help either. Furthermore, to be of use, traffic reports would have to be available to me at a distance from the Bay Area, and terrestrial radio signal is usually not strong enough to give me a signal in time to use the information.”).

XM and Sirius satellites are located thousands of miles above the Earth and are thus unaffected by natural or man-made disasters.<sup>13</sup>

*Other innovative satellite radio services.* The traffic and weather service is not the only example of innovative new services offered by the Satellite Radio Providers. For example, in April 2003, XM introduced a real-time weather data service.<sup>14</sup> With this service, pilots, mariners, and mobile emergency crews for the first-time have access to real-time graphical weather data such as radar, wind-speed, and other information critical for navigation. Sirius has explored the potential to offer video. Both of these services are consistent with the authority of the Satellite Radio Providers to offer ancillary data services. *SDARS Order* ¶¶ 94-96. Moreover, XM offers a premium channel which allows subscribers to hear certain content only if they agree to pay an additional monthly fee. These are but a few examples of the innovative services contemplated by the Satellite Radio Providers as they explore ways to offer better and more attractive services to their subscribers.

*NAB Petition.* On April 14, 2004, in response to the introduction by XM and Sirius of their traffic and weather services, NAB filed the above-captioned Petition for Declaratory Ruling. NAB argues that throughout the history of the SDARS rulemaking, XM and Sirius promised the Commission that they would provide only national programming and would not offer local news, traffic, and weather. *NAB Petition* at 3-4, 6-8. It contends that the Commission relied on these promises in finding that satellite radio would be a national-only service and

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<sup>13</sup> The Media Security and Reliability Council has supported the concept of redundancy for media outlets. See Media Security and Reliability Council, *Comprehensive Best Practices Recommendations* (March 2, 2004) (available at: [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-244391A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-244391A1.doc)).

<sup>14</sup> *Press Release, XM Radio and Weather Works to Launch Breakthrough Real-Time Weather Data Service for Aviation, Marine, and Emergency Management* (April 7, 2003) ([http://www.xmradio.com/newsroom/screen/pr\\_2003\\_04\\_07.html](http://www.xmradio.com/newsroom/screen/pr_2003_04_07.html)).

therefore would not have an adverse economic impact on terrestrial broadcasters. *Id.* at 5, 9-10. NAB argues that with the introduction of a traffic and weather service, XM and Sirius have broken these promises and undermined the policy foundation upon which the Commission authorized SDARS. *Id.* at 5, 9, 13. NAB claims, without any support, that the traffic and weather service will have an adverse economic impact on terrestrial broadcasters, thereby undermining localism. *Id.* at 16-21. Moreover, NAB contends that the Satellite Radio Providers promised to offer children's, ethnic, and niche programming, but have now abandoned those promises in favor of dedicating channel capacity to their traffic and weather services. *Id.* at 10-13.

NAB also expresses concern that the satellite radio providers are developing receivers with Global Positioning System ("GPS") and store-and-forward technology that would enable the delivery of programming tailored to the listener's location. *NAB Petition* at ii, 2. In addition, NAB repeats concerns it expressed well over two years ago<sup>15</sup> regarding a patent obtained by XM which it claims demonstrates that XM plans to use its repeaters to provide locally differentiated programming. *Id.* at 14.

In light of these concerns, NAB asks the Commission to prohibit the Satellite Radio Providers from (i) offering "locally oriented" services on nationally distributed channels and (ii) using any technology that would permit delivery of content that would be aired on a receiver in one location that differs from content aired on a receiver in a different location. *See NAB Petition* at 1.

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<sup>15</sup> See Letter from Mr. Jack N. Goodman, NAB, to Mr. William F. Caton, FCC, IB Docket No. 95-91 (March 4, 2002).

## Discussion

### **I. THE COMMISSION SHOULD NOT PRECLUDE THE SATELLITE RADIO PROVIDERS FROM OFFERING PROGRAMMING THAT MAY BE OF A LOCAL INTEREST**

#### **A. Even With “Locally Oriented” Traffic and Weather Service, Satellite Radio Continues to Be a National-Only Service**

NAB states that XM and Sirius have broken their “promises” to provide national-only programming by introducing a “locally oriented” traffic and weather service. *NAB Petition* at 5, 9. In fact, no promises have been broken. The previous statements made by XM and Sirius that satellite radio would be national are still true, from both a technological and a content perspective. From a technological perspective, all satellite radio programming is transmitted nationwide to all receivers simultaneously. There is no local origination of programming. From a content perspective, while XM and Sirius offer some programming that may be of more interest to people in certain geographic areas than others, this does not convert the content of the programming from “national” to “local” in nature. What NAB may consider “local” programming is in fact of “national” interest. For example, a satellite radio listener in Indiana may be interested in hearing weather forecasts and traffic reports for Los Angeles if he is planning to travel to Los Angeles.<sup>16</sup> Similarly, a trucker driving south on I-95 in Philadelphia may be interested in hearing traffic and weather information for Washington if his route will take him through the Washington area. There is simply no rational basis for the distinction that NAB wants to draw between “local” and “national” content.<sup>17</sup>

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<sup>16</sup> See, e.g., Comment of David Varnau (Highland, Indiana), MB Docket No. 04-160 (June 3, 2004) (“I have found the instant Traffic and Weather channels helpful. I am going on a trip to Los Angeles this summer and I have found by listening to the weather and traffic in LA it has helped me plan better for my trip.”).

<sup>17</sup> Traffic information itself may even serve as a form of entertainment. For example, in a letter to the *Washington Post*’s Dr. Gridlock, an XM listener noted the following: “The addition of

The Commission has never adopted any rule or policy that prohibits the Satellite Radio Providers from offering programming that may be of a local interest. Thus, NAB is wrong when it claims that XM and Sirius have been “unjustly enriched” because it allegedly was not contemplated at the time of the SDARS auction that the auction winners could provide non-national programming. *NAB Petition* at 19-20. There was nothing in the *SDARS Order* or rules at the time of SDARS auction, and there still is nothing today, that prohibits satellite radio programming that happens to be of local as well as national interest. To prohibit now the Satellite Radio Providers from offering programming that may be of local interest, over seven years after the satellite radio auction ended, would constitute a major modification of their licenses. Not only would such a modification require a hearing pursuant to Section 316 of the Communications Act,<sup>18</sup> it could also amount to an unconstitutional taking considering that such a prohibition was not in effect at the time of the satellite radio auction.

The previous statements by the Satellite Radio Providers that they would not provide local news, weather, and traffic must be placed in their appropriate context. *NAB Petition* at 6-8, 9. These statements were made at a time when it was expected that each satellite radio provider would offer only twenty to forty channels. *SDARS Order* ¶ 15. Compression technology has now advanced to the point where each satellite provider offers 120 channels of high-quality audio service. At the time these statements were made, it could not have been contemplated that sufficient capacity would be available to provide a service such as a nationwide instant traffic

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XM instant traffic and weather has been great. Once I know the status of my commute, I like to listen to the rush-hour information for other cities -- and, in most cases, be glad I'm not there!” See Ron Shaffer, *Is Moving the Best Solution for City Parking Woes?*, Washington Post, May 13, 2004.

<sup>18</sup> 47 U.S.C. § 316 (requiring a hearing before the Commission can modify a license).

and weather service for major metropolitan areas. Far from something the Commission should admonish and prohibit, this kind of technological advancement should be encouraged.

Finally, NAB is wrong when it claims that the Satellite Radio Providers do not offer a wide array of children's, ethnic, and niche programming. *NAB Petition* at 11-13. For example, XM currently offers two Spanish-language channels, four World music channels, two children's channels, as well as channels such as "The Power" (African American talk), "Open Road" (for the trucking community), and "Family Talk" (faith-based guidance) which are not offered by terrestrial broadcasters today. Sirius offers two Spanish-language channels, four Latin and World music channels, two comedy channels, an extensive line-up of sports channels, as well as such channels as SIRIUS Trucking Network, SIRIUS Right, SIRIUS Left, and SIRIUS OutQ (gay and lesbian radio). Despite NAB's claim, the Satellite Radio Providers have not sacrificed this children's, ethnic, and niche programming in favor of offering a traffic and weather service. *Id.* at 11-13. The fact is that the traffic and weather service requires only a very limited amount of bandwidth. The vast majority of bandwidth is still dedicated to music, talk, and to the children's, ethnic, and niche programming the Commission envisioned in licensing satellite radio.

**B. There Is No Basis for a Ban on "Locally Oriented" Programming Because There Is No Evidence of Harm to Terrestrial Broadcasters**

NAB argues that the traffic and weather service offered by XM and Sirius will harm terrestrial broadcasters, but offers no evidence that the service is having such an impact. *NAB Petition* at 17-18. Due to limited bandwidth, it is not possible for the Satellite Radio Providers to offer traffic and weather information for every metropolitan area. The Satellite Radio Providers currently provide the information only for approximately twenty major metropolitan areas. Thus, even if the service was having an economic impact on terrestrial broadcasters, and there is

no evidence that it is, any impact would be minor and limited to a handful of major markets. There would be no economic impact on the “small market” stations which the Commission previously found would be the most likely to be impacted (if at all) by satellite radio (*SDARS Order* ¶ 27) and for which NAB expresses concern. *NAB Petition* at 8, 17, 18. The major markets for which XM and Sirius provide their traffic and weather updates are dominated by large station groups not in need of the economic protectionism advocated by NAB.

NAB misleadingly claims that the Commission authorized satellite radio based solely on the conclusion that satellite radio would not harm terrestrial broadcasters because the service would be national in nature. *NAB Petition* at 9-10. In fact, the national nature of satellite radio was just one of three independent reasons upon which the Commission based its conclusion that satellite radio was not likely to impact terrestrial broadcasters. The other two reasons were that satellite radio “will require new and relatively costly equipment” and “may be offered via paid subscription.” *SDARS Order* ¶ 18. NAB’s Petition ignores these other two independent bases for the Commission’s conclusion that satellite radio would not harm terrestrial broadcasters. Even assuming that satellite radio is no longer a “national” service, these other two bases are still valid today -- the service provided by both XM and Sirius is offered on a paid subscription basis and requires the additional purchase of a receiver. There is thus no reason to “re-open the *SDARS* proceeding to evaluate the impact of the service on local broadcasting,” as NAB urges. *NAB Petition* at ii-iii, 3. The Commission’s previous finding that satellite radio is not likely to have an adverse impact on terrestrial broadcasting is just as true today as it was in 1997.

NAB’s Petition is permeated by a certain hypocrisy. NAB argues that satellite radio will harm localism, but the terrestrial radio industry today is itself increasingly consolidating ownership and operations, with uniform programming often delivered to “local” stations from

centralized studios. While NAB criticizes XM and Sirius for allegedly failing to offer niche and ethnic programming, a scan of any AM or FM dial in America today reveals the same generic programming from market to market.<sup>19</sup> Moreover, while NAB characterizes satellite radio as threatening the economical well-being of terrestrial broadcasters, the fact remains that terrestrial broadcasters enjoy significant advantages over satellite radio. Whereas there are only two million satellite radios in the United States today, virtually every car and home in the United States has at least one AM/FM radio, adding up to well over a billion receivers capable of receiving the product of NAB members. Further disadvantaging the Satellite Radio Providers is their having paid nearly \$170 million to the U.S. Treasury for their licenses, whereas most terrestrial broadcasters received their licenses, including the right to broadcast digitally, for free. The Satellite Radio Providers must also pay for music rights whereas terrestrial broadcasters do not. The fact is that satellite radio is still a nascent industry and faces significant hurdles that terrestrial broadcasters do not. Giving these advantages, it is disingenuous in the extreme for NAB to claim that satellite radio is a threat to the existence of terrestrial broadcasting.

While NAB is disingenuous, it is at least consistent. NAB has a long and unfortunate history of opposing any new service that may threaten the economic interests of terrestrial broadcasters, no matter how much consumers value these new services. In addition to its opposition to satellite radio,<sup>20</sup> NAB steadfastly opposed the introduction of Direct Broadcast

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<sup>19</sup> See, e.g., Peter DiCola and Kristin Thompson, *Radio Deregulation: Has it Served Citizens and Musicians?*, Future of Music Coalition, November 18, 2002, at p. 55, available at <http://www.futureofmusic.org/images/FMCRadiostudy.pdf> (“Overlap of almost half of the songs being played between formats suggests that increased format diversity does not necessarily increase musical variety. . . . [T]he remarkable homogeneity of radio formats is apparent.”).

<sup>20</sup> See, e.g., Comments of NAB, RM-7400 (August 20, 1990); Comments of NAB, File Nos. 49/50-DSS-P/LA-90 et al. (November 20, 1990); NAB, Petition to Deny Application of Satellite CD Radio, Inc. File Nos. 49/50-DSS-P/LA-90 et al. (November 13, 1992); Comments of NAB,



Satellite (“DBS”) in the 1980s and cable television in the 1970s because of the potential impact on local television stations.<sup>21</sup> NAB’s brand of anti-consumer, economic protectionist policies stand in stark contrast to the Satellite Radio Providers, which have never opposed the introduction of digital radio by terrestrial broadcasters.

**C. A Ban on “Locally Oriented” Programming Would Eliminate the Crucial Public Interest Benefits of the Traffic and Weather Service as well as Restrict Consumer Choice**

As discussed above, the traffic and weather services provided by XM and Sirius provide crucial public interest benefits, such as providing alerts as to impending severe weather, informing drivers of traffic congestion allowing them to plan alternate routes thereby saving time and fuel, and facilitating traffic management particularly for long-distance drivers such as truckers. Moreover, the traffic and weather services offered by the Satellite Radio Providers offer unique advantages over terrestrial broadcasters, such as instant availability, more frequent updates, nationwide and ubiquitous service, and reliability in times of natural or man-made disasters. The over 24,000 satellite radio listeners that have filed comments to date in opposition to NAB’s Petition demonstrate that the traffic and weather services provided by XM and Sirius are serving the public interest. If the Commission were to grant NAB’s proposal, however, all of these public interest benefits would be eliminated in order to allegedly protect the economic interests of terrestrial broadcasters.

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GEN Docket No. 90-357 (January 29, 1993); Letter from Edward O. Fritts, NAB, to Hon. Reed E. Hundt, Chairman, FCC, GEN Docket No. 90-357 (May 3, 1995).

<sup>21</sup> See, e.g., Merrill Brown, *NAB Tactics on Satellite TV Scored*, Washington Post, December 21, 1981 (noting NAB’s opposition to DBS); Ernest Holsendolph, *U.S. Backs Construction of Satellite-to-Home TV*, N.Y. Times, September 23, 1982 (noting NAB’s opposition to DBS); Tom Shales, *Cable Breaks; The Cable TV Ruling; And Commercial Shakes*, Washington Post, July 24, 1980 (noting NAB’s opposition to cable); Patrick R. Parsons & Robert M. Frieden, *The Cable and Satellite Television Industries* (1998), at 49 (noting broadcast industry’s use of economic harm argument in opposition to cable).

**D. A Ban on “Locally Oriented” Programming Would Violate the First Amendment**

NAB’s request that the Commission ban XM and Sirius from offering “locally oriented” programming would also violate their First Amendment rights. This is a particularly startling request coming from an organization such as NAB that claims to value the First Amendment. First, any ban on “locally oriented” programming would be unconstitutionally vague.<sup>22</sup> There is simply no reasonable means for distinguishing between “local” and “national” content. Indeed, not even NAB proposes definitions for these terms. Any definition the Commission devises of either “locally oriented” or “national” programming will be subjective and vague, making it impossible for the Satellite Radio Providers to comply.

Second, a ban on “locally oriented” programming would be a content-based restriction on speech. As such, it “may be sustained only if the government can show that the regulation is a precisely-drawn means of serving a compelling state interest.”<sup>23</sup> The Commission cannot satisfy this standard in this case because, among other reasons, there is simply no evidence in the record that the “locally oriented” traffic and weather service is causing harm to terrestrial broadcasters.

**E. A Ban on “Locally Oriented” Programming Would Involve the Commission in Regulating Format, in Express Violation of Its Stated Policies**

Throughout its history, the Commission has held steadfastly to the principle that programming decisions should be left to the market.<sup>24</sup> In *The Public and Broadcasting*, the

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<sup>22</sup> See *NEA v. Finley*, 118 S Ct 2168, 2179 (1998) (“The First and Fifth Amendments protect speakers from arbitrary and discriminatory enforcement of vague standards.”) (citing *NAACP v. Button*, 371 US 415, 432-433)).

<sup>23</sup> *Chicago Cable Communications v. Chicago Cable Commission*, 879 F.2d 1540, 1550 (7th Cir. 1989), citing *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 540 (1980).

<sup>24</sup> *The Public and Broadcasting*, 999 WL 391297 (1999); *Television Deregulation*, 98 F.C.C.2d 1076 (1984); *Entertainment Formats of Broadcast Stations*, 68 F.C.C.2d 858 (1976).

Commission stated that it cannot “tell stations how to select material for news programs, and [it] cannot prohibit the broadcasting of an opinion on any subject.” *Id.* at 8. Moreover, the Supreme Court has held that it is impossible to make an objective decision on how certain formats would affect the public interest. *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981). In this case, NAB is asking the Commission to reverse course and regulate the programming offered by the Satellite Radio Providers. Such a fundamental reversal in Commission policy would require far more of showing of harm to terrestrial broadcasters than the vague assertions NAB has offered.

## **II. NAB’S REQUEST THAT THE COMMISSION REGULATE SATELLITE RADIO RECEIVER TECHNOLOGY MUST BE DENIED**

NAB’s request that the Commission ban technology that would allow “delivery of content that would be aired on a receiver in one location that differs from the content that would be aired on a receiver in a different location” must be denied. *NAB Petition* at ii-iii, 2. As an initial matter, this prohibition directly contradicts what NAB recently agreed to with XM in crafting a rule governing terrestrial repeaters:

“this language allows the provision of services that are transmitted to all subscribers’ receivers by both the SDARS satellites and repeaters, but are not necessarily processed by a subscriber’s receiver if the subscriber has not paid an additional fee for additional services or the content is otherwise filtered or blocked.”<sup>25</sup>

As this language states, NAB specifically agreed that satellite radio receivers could filter or block content, which would allow content to be aired on a receiver in one location that differs from content aired on a receiver in another location. Moreover, adoption of NAB’s proposed prohibition would preclude innovative and beneficial services that the Satellite Radio Providers are already offering. For example, NAB’s proposed prohibition would preclude XM from

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<sup>25</sup> See Letter from Lon C. Levin, XM Radio Inc., and Jack N. Goodman, NAB, to Ms. Magalie Roman Salas, FCC, IB Docket No. 95-91 (December 23, 2003), at 1 (“*Joint XM/NAB Letter*”).

offering its premium channel, which is blocked at a subscriber's receiver unless an additional fee has been paid. NAB's prohibition might also preclude XM's weather data service, which allows subscribers to view graphical weather data that is relevant to their location. Finally, even assuming the Commission wished to regulate satellite radio receiver technology, the Commission is currently conducting a proceeding exploring whether it even has the requisite statutory authority to regulate receivers.<sup>26</sup>

The Satellite Radio Providers will continue to invest time and resources developing new and innovative services for consumers. NAB's proposal would curb this innovation and harm consumers, all in the interest of purportedly protecting the economic interests of terrestrial broadcasters. The Commission should flatly reject NAB's proposal to regulate satellite radio receiver technology and reaffirm that the Satellite Radio Providers are free, consistent with the existing rules, to innovate and expand their service offerings to meet consumer demands.

### **III. THE COMMISSION SHOULD ADOPT THE RULE NAB HAS AGREED TO GOVERNING TERRESTRIAL REPEATERS**

SBCA does not object to the proposal of NAB that the Commission adopt the language proposed by XM and NAB in December 2003 intended to prohibit terrestrial repeaters from being used to originate local programming:

“SDARS repeaters are restricted to the simultaneous transmission of the complete programming, and only that programming, transmitted by the satellite directly to SDARS subscribers' receivers, and may not be used to distribute any information not also transmitted to all subscribers' receivers.” *Joint XM/NAB Letter* at 1.

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<sup>26</sup> See *Interference Immunity Performance Specifications for Radio Receivers*, Notice of Inquiry, ET Docket No. 03-65 (March 24, 2003), at ¶ 22.

In fact, this is the only restriction ever contemplated during the course of the SDARS rulemaking on how the Satellite Radio Providers could offer service.<sup>27</sup> NAB's new foray into proposing additional regulation of satellite radio content and satellite radio receiver technology are not only bad ideas, but they also come far too late for the Commission to give them any credence.

### **Conclusion**

For the foregoing reasons, SBCA urges the Commission to deny NAB's Petition for Declaratory Ruling.

Respectfully submitted,

/s/Richard DalBello

Richard DalBello

President

Satellite Broadcasting and Communications Association

225 Reinekers Lane – Suite 600

Alexandria, VA 22314

(703) 549-6990

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<sup>27</sup> NAB repeats concerns it raised well over two years ago regarding a patent obtained by XM which it claims demonstrates that XM plans to use its repeaters to provide locally differentiated programming. *NAB Petition* at 14; *see also* Letter from Jack N. Goodman, NAB, to Mr. William F. Caton, FCC, IB Docket No. 95-91 (March 4, 2002). XM has already responded to these baseless allegations. *See* Letter from Lon C. Levin, XM Radio, to Mr. William F. Caton, FCC, IB Docket No. 95-91 (March 7, 2002).

## **CERTIFICATE OF SERVICE**

I, Sylvia A. Davis, hereby certify that on this 4th day of June 2004, served a true copy of the foregoing by first class United States mail, postage prepaid, upon the following:

Jack N. Goodman  
Ann West Bobeck  
National Association of Broadcasters  
1771 N Street, NW  
Washington, DC 20036

/s/Sylvia A. Davis  
Sylvia A. Davis